

NOTICE  
Decision filed 07/13/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110198-U  
NO. 5-11-0198  
IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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|---------------------------|---|-------------------|
| CHRISTOPHER J. HIGHTOWER, | ) | Appeal from the   |
|                           | ) | Circuit Court of  |
| Plaintiff-Appellant,      | ) | Randolph County.  |
|                           | ) |                   |
| v.                        | ) | No. 10-MR-92      |
|                           | ) |                   |
| ROY GRATHLER,             | ) | Honorable         |
|                           | ) | Eugene E. Gross,  |
| Defendant-Appellee.       | ) | Judge, presiding. |

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JUSTICE STEWART delivered the judgment of the court.  
Justices Chapman and Spomer concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where the plaintiff's complaint was barred by the statute of limitations, the judgment of the circuit court is affirmed.

¶ 2 Christopher J. Hightower, an inmate in the Illinois Department of Corrections, appeals from the circuit court's order granting the defendant's motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)). For the following reasons, we affirm.

¶ 3 **BACKGROUND**

¶ 4 At all relevant times, Hightower was incarcerated at Menard Correctional Center (Menard) and the defendant, Roy Grathler, was a correctional officer at Menard.

¶ 5 Following an incident on March 14, 2008, Hightower filed a grievance against Grathler on March 17, 2008. In that grievance, he alleged that Grathler had abused his authority when he told Hightower to stop talking to another inmate about a legal issue while

in the law library. The department's grievance officer found that there was insufficient evidence to substantiate Hightower's allegations. The chief administrative officer concurred. The Administrative Review Board (ARB) reviewed the grievance and found Hightower's allegations to be unsubstantiated as well.

¶ 6 Grathler issued a disciplinary ticket against Hightower on April 4, 2008, and stated that Hightower had been insolent, did not obey a direct order, and delayed a line-movement, in contravention of rules 304 (insolence), 307 (unauthorized movement), and 403 (violation of rules). Hightower pled "not guilty" to the adjustment committee. The adjustment committee found Hightower guilty of violating rules 304, 307, and 403. It recommended that Hightower be reduced to "C" grade for 30 days and be placed on a 30-day commissary restriction.

¶ 7 On April 22, 2008, Hightower filed another grievance against Grathler, alleging that the April 4, 2008, disciplinary ticket that Grathler issued to Hightower was in retaliation for Hightower's March 17, 2008, grievance. In this most recent grievance, Hightower requested that he be paid \$25,000 for the "intentional, willful violation of my constitutional rights; the malfeasance, the misfeasance by c/o Grathler and permanently remove c/o Grathler from his post in the law library." He also stated that Grathler told him, "[Y]ou like filing grievances against me, then file one on this." The grievance officer recommended that Hightower's grievance be denied. Hightower appealed. On October 2, 2008, the ARB recommended that the charges against Hightower concerning rules 304 and 403 be dismissed but the charge involving rule 307 should be upheld. The Director concurred.

¶ 8 In the meantime, Grathler issued another ticket to Hightower on June 6, 2008, charging Hightower with insolence and disobeying a direct order because he was talking loudly in the law library and had been warned several times to desist. The adjustment committee found Hightower guilty of both charges and recommended that he receive two

months reduction to "C" grade status and two months commissary restriction.

¶ 9 Hightower then filed another grievance against Grathler stating that Grathler issued a false disciplinary ticket against him in retaliation for the grievances he filed. The grievance officer recommended that the grievance be denied. On December 22, 2008, the ARB found that Hightower's claims of staff misconduct were not substantiated. However, it also found that there were issues of noncompliance with department procedures and determined that Hightower's ticket should be expunged. The Director concurred.

¶ 10 On November 8, 2010, Hightower filed a *pro se* civil complaint under section 1983 of the Civil Rights Act (42 U.S.C. § 1983 (2010)) alleging that Grathler had violated his first and fourteenth amendment rights by issuing false disciplinary reports and that Grathler's conduct constituted "misfeasance." On December 20, 2010, Grathler filed a motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 2-619 (West 2010)). On February 10, 2011, the circuit court granted Grathler's motion to dismiss. On March 14, 2011, Hightower filed a motion to reconsider, vacate, or set aside the dismissal. On March 16, 2011, the circuit court denied the motion to reconsider. Hightower then filed a motion to file an amended complaint. Grathler filed a motion to strike the amended complaint, and the circuit court granted that motion on April 27, 2011. This appeal followed.

¶ 11 ANALYSIS

¶ 12 A motion to dismiss under section 2-615 of the Code admits all well-pleaded facts and tests the legal sufficiency of the complaint, and a ruling on the motion is subject to *de novo* review. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). A dismissal pursuant to section 2-615 of the Code is permitted when a party fails to state a claim which would entitle him to relief. *Id.* We construe the allegations in the light most favorable to the plaintiff. *People v. Beacham*, 231 Ill. 2d 51, 58 (2008). Likewise, we review a dismissal

pursuant to section 2-619 of the Code *de novo*. *Glisson v. City of Marion*, 188 Ill. 2d 211 (1999). Dismissal pursuant to section 2-619 of the Code is appropriate when an affirmative matter exists that defeats the plaintiff's claim. An "affirmative matter" is a "defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Id.* at 220. Section 2-619(a)(5) allows for involuntary dismissal of an action that was not commenced within the time allowed by law. 735 ILCS 5/2-619(a)(5) (West 2008).

¶ 13 The statute of limitations for a claim brought pursuant to section 1983 is controlled by the forum state's statute of limitations for personal injury actions. *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007). In Illinois, the statute of limitations for a personal injury action is two years. *Id.* The cause of action in a section 1983 claim accrues when the plaintiff knows or should have known that his civil rights have been violated. *Id.* at 388. However, the tolling statute in Illinois (735 ILCS 5/13-216 (West 2008)) tolls the limitations period where there is a statutory prohibition that would prevent a plaintiff's cause of action. *Johnson v. Rivera*, 272 F.3d 519, 521 (7th Cir. 2001). A prisoner must exhaust his administrative remedies before he is able to file a section 1983 claim. *Id.*

¶ 14 In the present case, Hightower alleged that his constitutional rights were violated by the issuance of the April 4, 2008, and June 6, 2008, disciplinary tickets. As noted above, the June 6, 2008, disciplinary ticket was expunged. Consequently, the issuance of this ticket provided no basis for relief, and the counts of Hightower's section 1983 action based thereon were properly dismissed. With respect to the April 4, 2008, ticket, the administrative process concluded on October 17, 2008, when the Director concurred with the ARB's recommendation. Thus, Hightower had until October 17, 2010, to file an action based on the issuance of this ticket. His complaint was file-stamped by the Randolph County clerk on November 8, 2010.

¶ 15 Hightower argues that the "mailbox" rule applies, as in *Houston v. Lack*, 487 U.S. 266, 270 (1988). Under *Houston*, a prisoner's pleadings are considered to be filed on the date that they are placed in the prison mail system. *Id.* at 270. The general rule in Illinois is that prisoners' pleadings are considered filed on the date that they are placed in the prison mail system. *People v. Smith*, 2011 IL App (4th) 100430, ¶ 16. Illinois Supreme Court Rule 12(b)(3) (eff. Dec. 29, 2009) sets out how to determine the date of filing for motions and complaints. *People v. Tlatenchi*, 391 Ill. App. 3d 705, 710-17 (2009). Hightower argues that he placed his complaint in the prison mail system on October 12, 2010.

¶ 16 In the case of service by mail, Supreme Court Rule 12(b)(3) requires that a certificate of an attorney or an affidavit of a person other than an attorney who deposited the document in the mail be attached stating the time and place of the mailing, as well as information to indicate that proper postage was paid and the complete address was included. Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009). A certification pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2010)) is not the equivalent of a notarized proof of service required by Rule 12(b)(3). *Tlatenchi*, 391 Ill. App. 3d at 716. In *Tlatenchi*, the court held that because the defendant's proof of service did not comport with Rule 12(b)(3), it was insufficient to establish that her motion was mailed on a timely date. *Id.*

¶ 17 Here, Hightower attached to his petition to proceed *in forma pauperis* and his complaint a certificate of service, which he verified under section 1-109 of the Code asserting that he placed the documents in the prison's mailing system on October 12, 2010. However, he failed to include an affidavit of proof notarized by someone who has authority to administer oaths. Therefore, even if the mailbox policy applies, Hightower's certificate of service was not notarized and there is no evidence to establish that his complaint was placed in the prison mail system on October 12, 2010.

¶ 18 It should be further noted that where a petition commences a new action and does not

merely continue a prior action, the petition is not considered to be filed until it passes into the actual physical possession of the clerk of the circuit court, and the date of mailing is not controlling. *People v. Floyd*, 210 Ill. App. 3d 840, 843 (1991). Hightower's action is a new action because he is not continuing a prior action. Under this view, the complaint was filed on November 8, 2010, which is beyond the two-year statute of limitations.

¶ 19

#### CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Randolph County is affirmed.

¶ 21 Affirmed.